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IN THE
COURT OF APPEALS OF INDIANA

BRENT A. MUTZFELD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 76A04-0702-CR-81
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE STEUBEN CIRCUIT COURT
The Honorable Allen N. Wheat, Judge
Cause No. 76C01-0310-FB-1177

June 21, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Brent Mutzfeld appeals his sentence for Illegal Possession of Anhydrous Ammonia,[1] a class D felony, and Illegal Possession of Precursors,[2] a class D felony. Specifically, Mutzfeld argues that his three-year sentence is inappropriate in light of the nature of his offenses and his character. Concluding that Mutzfeld's sentence is not inappropriate, we affirm the judgment of the trial court.

FACTS

On October 22, 2003, the State charged Mutzfeld with class B felony dealing in methamphetamine, class D felony illegal possession of anhydrous ammonia, and class D felony illegal possession of precursors. On April 11, 2006,[3] Mutzfeld pleaded guilty to the latter two charges, and the State agreed to dismiss the dealing in methamphetamine charge and two charges pending under another cause number.[4] Appellant's App. p. 45-47. The plea agreement also provided that the trial court's sentences would run concurrently. The trial court accepted the plea agreement on December 4, 2006, and sentenced Mutzfeld to three years imprisonment on each conviction, with the sentences to run concurrently. Mutzfeld now appeals.

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[1] Ind. Code § 35-48-4-14.5(c).

[2] I.C. § 35-48-4-14.5(e).

[3] The trial court unsuccessfully set this cause for jury trial four times between the date charges were filed and the date Mutzfeld pleaded guilty. The trial court vacated the jury trial once because of court congestion and Mutzfeld moved to vacate three times.

[4] Pursuant to the plea agreement, the State dismissed the class B felony dealing in methamphetamine and class D felony possession of precursors charges pending under cause number 76C01-0502-FB-155.

DISCUSSION AND DECISION

Mutzfeld argues that his three-year sentence is inappropriate based on the nature of his offenses and his character. Specifically, Mutzfeld argues that his offenses did not threaten the community and that his decision to plead guilty demonstrates his favorable character.

Our court has the constitutional authority to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is "inappropriate in light of the nature of the offense and the character of the offender." Indiana Appellate Rule 7(B). However, sentence review under Appellate Rule 7(B) is very deferential to the trial court's decision, Martin v. State, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003), and we refrain from merely substituting our judgment for that of the trial court, Foster v. State, 795 N.E.2d 1078, 1092 (Ind. Ct. App. 2003). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

The amended sentencing statutes[5] provide that for a class D felony, a person "shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory

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[5] Indiana's sentencing scheme was amended effective April 25, 2005, to incorporate advisory sentences rather than presumptive sentences and comply with the holdings in Blakely v. Washington, 542 U.S. 296 (2004), and Smylie v. State, 823 N.E.2d 679 (Ind. 2005). See Ind. Code §§ 35-38-1-7.1, 35-50-2-1.3. Mutzfeld committed his criminal offenses before this statute took effect but was sentenced after the effective date. Under these circumstances, there is a split on this court as to whether the advisory or presumptive sentencing scheme applies. Compare Walsman v. State, 855 N.E.2d 645, 649-52 (Ind. Ct. App. 2006) (sentencing statute in effect at the time of the offense, rather than at the time of the conviction or sentencing, controls) with Samaniego-Hernandez v. State, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) (concluding that change from presumptive sentences to advisory sentences is procedural rather than substantive and, therefore, application of the advisory sentencing scheme is proper when defendant is sentenced after effective date of amendment even though he committed the crime prior to the amendment date).

Our Supreme Court recently indicated that the date of sentencing may be crucial. Prickett v. State, 856 N.E.2d 1203 (Ind. 2006). In a footnote, the Supreme Court stated that "[w]e apply the version of the statute in effect at the time of Prickett's sentence and thus refer to his 'presumptive' sentence, rather than an

sentence being one and one-half (1 1/2) years." Ind. Code § 35-50-2-7. Mutzfeld can challenge the appropriateness of his sentence on appeal because, notwithstanding the plea agreement's requirement that the trial court impose concurrent sentences, the trial court had the power to calculate the sentence that Mutzfeld received. Childress, 848 N.E.2d at 1080-81.

With regard to the nature of Mutzfeld's offenses, Mutzfeld had assisted others in obtaining the ingredients necessary to manufacture methamphetamine when the Steuben County Sheriff's Department received a tip reporting the suspicious activity. Officers from the department investigated the tip and found Mutzfeld and other men crushing ephedrine pills. As Mutzfeld admits, crushing pills signifies the beginning of the methamphetamine manufacturing process. Appellant's Br. p. 7 (citing Dawson v. State, 786 N.E.2d 742, 747-48 (Ind. Ct. App. 2003) (holding that crushing ephedrine pills begins the methamphetamine manufacturing process and is sufficient to sustain a conviction for dealing in methamphetamine by knowingly manufacturing it)). While Mutzfeld argues that his sentence is inappropriate because he had not completed the methamphetamine manufacturing process and "had not created the dangerous products of conditions associated with it[,]" appellant's br. p. 7, there is no evidence that Mutzfeld would have stopped the manufacturing if the police had not interrupted. We fail to see how Mutzfeld's sentence is inappropriate merely because the police interrupted his illegal activity at its beginning stages.

'advisory' sentence." Id. at 1207 n.3 (emphasis added). Because Mutzfeld was sentenced in December 2006, we will apply the amended sentencing statutes.

Turning to Mutzfeld's character, we note that Mutzfeld has previously been convicted of class D felony criminal confinement, class A misdemeanor battery resulting in bodily injury, class B misdemeanor public intoxication, and two counts of class A misdemeanor resisting law enforcement. Mutzfeld's criminal history demonstrates his penchant for unlawful activity and his failure to lead a law-abiding life. While Mutzfeld argues that his guilty plea demonstrates a "positive aspect" of his character, id. at 8, in light of the State's agreement to dismiss two class B felony charges and a class D felony charge in exchange for Mutzfeld's guilty plea, his decision appears to have been largely pragmatic. Therefore, we cannot find Mutzfeld's three-year sentence inappropriate in light of the nature of the offenses and his character.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and CRONE, J., concur.